(3)

Number 84-718

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Robert L. Mendenhall, Petitioner,

vs.

The United States of America,
The United States Department of the
Interior, and Cecil D. Andrus,
Secretary of the Interior and
Edward F. Spang, State Director of the
Nevada Office of the Bureau
of Land Management, Respondent.

Motion for leave to File Amicus Curiae

**Brief Amicus Curiae of Wayne Winters,
editor and publisher
Western Prospector and Miner**

William S. Andrews
Counsel for the
Western Prospector and Miner
1432 N. 7th Street
Phoenix, Arizona 85006
(602) 254-5051

27

No. 84-718

In The
Supreme Court of the United States

October Term, 1984

Robert L. Mendenhall, Petitioner,

vs.

The United States of America,
The United States Department of the
Interior, and Cecil D. Andrus,
Secretary of the Interior and
Edward F. Spang, State Director of the
Nevada Office of the Bureau
of Land Management, Respondent.

An Appeal from the U.S. Court of Appeals
9th Circuit

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

COMES NOW, Wayne Winters, by and through his attorney William S. Andrews, and moves that the Court grant permission to file an amicus curiae brief to the Western Prospector and Miner in support of the petition for writ of certiorari in Mendenhall v. U.S..

Nature of Applicant's Interest

The Western Prospector and Miner (WPM) is a monthly periodical with readership throughout the United States and abroad. Its editor, Wayne Winters, has had a long career editing newspapers primarily concerned with mining: Tombstone Epitaph (1964-1974); Bisbee Review (1974-1976) and Western Prospector and Miner (1975 to present). As editor of the Western Prospector and Miner, Winters has become painfully aware of growing discouragement among the small mining community with officers of the Department of Interior and the U.S. Forest Service.

Petitioner, Robert Mendenhall's, legal battle to secure title to his mining claims has been fought by many of the small miners about whom WPM reports. Despite compliance with the mining laws, however, few have ever won a legal tangle with agents of the U.S. Government and to the best of our

knowledge, no mining claimant has ever been heard by the U.S. Supreme Court in a battle against the Interior Department, except in those rare cases, when the claimant has survived Interior's tribunals to win in a lower court. Interior has invariably appealed such cases to the U.S. Supreme Court. Only then has the mining claimant been heard.

WPM believes that the granting of the petition for writ of certiorari of Robert L. Mendenhall would afford the Court the opportunity to bring about a peaceful solution to a problem which has been growing ever since the passing of the Surface Resources Act of July 23, 1955 and, with the solution, a renewed respect for law.

Facts inadequately set forth by Petitioner

Wayne Winters, editor of the WPM, has chronicled in his newspapers many mining claims which have been invalidated by

Respondent over the years and the vicious misuse of power by agents of the U.S. Forest Service practiced against a class of people who seem to have been forgotten by the justice system. In an affidavit made a part of the amicus curiae brief in the appendix, Winters summarizes the facts of those stories; and in a second appendix document, the most recent developments in the unrest in the community of small miners in northern California are set forth for the court in a copy of an article from the front page of the Western Prospector and Miner for December, 1984.

Also in the appendix to the amicus curiae brief are excerpts from a Senate hearing in 1966 which overwhelmingly substantiate that Respondent has willfully misadministered the Surface Resources Act of 1955. The question of the intent of Congress in passing that Act is fully answered and documented by these excerpts.

Questions of Law

Furthermore, the amicus curiae brief calls the court's attention to two important precedent cases not already cited in the Petition for writ of certiorari: Andrus v. Shell Oil Company, 446 U.S. 657, 660 (1980) dealing with the "marketability" test for discovery of a valuable mineral deposit; and Baker v. United States, 613 F.2d 224 (9th Cir. 1980), cert. denied, 449 U.S. 932 (1980) which addresses abuse of discretion by Respondent contrary to existing mining law in the administration of the Surface Resources Act.

Respectfully submitted,

William S. Andrews
Attorney for the
Western Prospector and Miner

Table of Contents

Table of Authorities

No. 84-7[illegible]8

In the
Supreme Court of the United States

October Term, 1984

Robert L. Mendenhall, Petitioner,

vs.

The United States of America,
The United States Department of the
Interior, and Cecil D. Andrus,
Secretary of the Interior and
Edward F. Spang, State Director of the
Nevada Office of the Bureau
of Land Management, Respondent.

An Appeal from the U.S. Court of Appeals
9th Circuit

Written consent of the Petitioner to file this amicus curiae brief was mailed to the Court on January 8, 1984. Written request was made on January 4, 1984, to the Respondent. The written request followed oral consent to filing the amicus curiae.

Shortly before noon, Arizona time, on January 9, 1985, Wayne Winters called Allen Horowitz of the Solicitor General's Office to inquire whether written consent had been timely filed with the Clerk of the U.S. Supreme Court. Horowitz replied: "Go ahead and file it (the amicus curiae brief). Assume that permission is granted unless you hear definitely from me to the contrary." Wishing to leave nothing to assumption, a motion for leave to file as an amicus curiae without written consent of Respondent has been attached hereto.

INTEREST OF AMICUS CURIAE

The Western Prospector and Miner is a monthly periodical with readership throughout the United States and abroad. Its editor, Wayne Winters, has had a long career editing newspapers primarily concerned with mining: Tombstone Epitaph (1964-1974); Bisbee Review (1974-1976) and

Western Prospector and Miner (1975 to present). As editor of the Western Prospector and Miner, Winters has become painfully aware of growing discouragement among the small mining community with officers of the Department of Interior and the U.S. Forest Service.

Petitioner's legal battle to secure title to his mining claims has been fought by many of the small miners about whom WPM reports. Despite compliance with the mining laws, however, few have ever won a legal tangle with agents of the U.S. Government and to the best of our knowledge, no mining claimant has ever been heard by the U.S. Supreme Court in a battle against the Interior Department, except in those rare cases, when the claimant has survived Interior's tribunals to win in a lower court. Interior has invariably appealed such cases to the U.S. Supreme Court.

WPM believes that the granting of the petition for writ of certiorari of Robert L. Mendenhall would afford the Court the opportunity to bring about a peaceful solution to a problem which has been growing ever since the passing of the Surface Resources Act of July 23, 1955 and, with the solution, a renewed respect for law. Wayne Winters, editor of the WPM has chronicled in his newspapers many mining claims which have been invalidated by Respondent over the years and a vicious misuse of power by agents of the U.S. Forest Service practiced against a class of people who seem to have been forgotten by the justice system. In an affidavit made a part hereof in the appendix, Winters summarizes the facts of those stories.

INTRODUCTION

Prior to the passing of the Surface Resources Act of 1955, hearings before offices of the Interior Department with regard to mining claims were invariably the result of a dispute between private users. After the Surface Resources Act of 1955, the Forest Service and the Bureau of Land Management became parties at interest in invalidation proceedings set up under the provision for Administrative Procedure (Title 5, Section 500, et seq.). Despite safeguards against arbitrary and capricious use of agency discretion in these quasi-judicial hearings, Respondent has been unable to overcome a conflict of interest in its contests against mining claimants.

Respondent has openly admitted that it believes the stated intent of Congress - to encourage mining on the public lands - is contrary to wise administration. Respondent advocates leasing the nations

minerals.[1] Using the inherent subjectivity and the judgmental imperative involved in the phrase "valuable mineral deposit" from the law entitling mining claims on the public lands, the Respondent has succeeded in nullifying the mining laws.

---

1. Testimony of Arthur W. Greeley, Associate Chief, Forest Service, Department of Agriculture in "Legislative Purpose of Public Law 167" (30 U.S.C.A. 611). Hearing before the Subcommittee on Minerals, Materials, and Fuels of the Committe on Interior and Insular Affairs, U.S. Senate, 89th Cong., Second Session on S. 2281 and S. 3485, Bills to Amend Section 3 of the Act of July 23, 1955 (69 Stat. 367, 368), June 28, 1966.

ARGUMENT

I. The Common Varieties Act of 1955, 30 U.S.C. § 611, Does Not Apply to Commercially Valuable Deposits

By the term of the Common Varieties Act, "common varieties" which may not be located do not include materials with a "distinct and special value." It is clear that the intent of Congress was to prevent bad faith mining claimants from obtaining land for other purposes than mining under the mining laws and not to prevent the location by bona fide miners of valuable mineral deposits. It is important that the Supreme Court re-affirm this basic principle of the mining laws as Congress has in each and every statute that it has passed effecting public lands open to mineral entry.

Although the intent of Congress clearly was to allow the location of commercially valuable sand, rock, gravel

and cinders, etc., the statute has been repeatedly misconstrued by the Department of Interior which has disallowed the location of obviously valuable mineral deposits.

In addition, the circuit courts have not been precise in their definition of common varieties. See, e.g., Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974), McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969), and Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975). cert. denied, 423 U.S. 1033 (1975).

II. Because the Surface Resources Act Does Not Apply to Commercially Valuable Deposits the Test for Discovery Must be Made by Looking At Present Conditions and Not Those in 1955

When Congress passed the Common Varieties Act it intended only to prevent the location of deposits of sand, stone, gravel, cinders, etc., that were common,

i.e., not commercially valuable, and Congress in no way intended to preclude the future location of commercially valuable, deposits of these materials. Because the location of such deposits is permissable today, any challenge to the validity of a discovery should look to the present value of the deposit rather than those conditions that may have existed in 1955. In the case of the Mendenhall deposit at issue, it is clear that because this was an active producer when the invalidation proceedings commenced, all of the tests for discovery clearly have been met.

III. Even If a Showing of a Valuable Mineral Deposit in 1955 Was Relevant the Department Erred in Misapplying the Supreme Court's Test for Mineral Validity Determinations

In 1905 the United States Supreme Court approved the Department of Interior's "prudent-man test" under which discovery of a "valuable mineral deposit" requires proof

of a deposit of such character that a "person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success, in developing a valuable mine." Chrisman v. Miller, 197 U.S. 313 (1905). In United States v. Coleman, 390 U.S. 599 (1968); the court approved the department's marketability test--whether a mineral can be extracted, removed and marketed at a profit--determining it to be a logical complement of the prudent man standard. See also, Andrus v. Shell Oil Company, 446 U.S. 657, 660 n.4 (1980).

Unfortunately, the department's application of the marketability test has been anything but a "complement" of the prudent man rule. Where the marketability test, as approved by the Supreme Court, was intended to be a flexible evidentiary standard, the department has instead used

it as a rigid and singular test of validity in circumstances where that test is neither appropriate nor logical.

As stated in Coleman, the marketability test was designed only to throw light on a prospector's intent and only to determine a prudent man could reasonably believe that a profitable mine could be put in production and not whether a presently profitable mine existed. In looking at the "market" the department has totally ignored a crucial factor in all market determinations: A market depends not only upon present conditions, but also upon whether those conditions can be developed. In other words, in applying the marketability test the department has totally ignored the reasonable ability of mineral operators to develop a market for a valuable product.

That present marketability is not a sine qua non of all mineral discoveries was shown in Andrus v. Shell Oil, 446 U.S. at

663 n.6, where the court reasoned that under the Mineral Leasing Act Congress did not consider "present marketability" a prerequisite to the patentability of oil shale.

In any event, the marketability test as applied in Coleman is not necessarily the same marketability test that should be applied in this case. Coleman involved a patent proceeding. If the claims in Coleman had been shown to be valuable then the government would have forever lost all fee title to the claims. Such circumstances warrant a strict test of mineral value. However, in this case the claim invalidation proceedings are not in response to a patent application. Rather they are based upon a determination by the department that the department would prefer the claims to be invalid.

Indeed, in this case, there are no allegations of any higher or better use of

the land in question. For this reason the marketability test, if applied at all, should be liberally construed in order to fully comport with the intent of Congress in the Mining Law of 1872. Specifically, the mineral claimant should be permitted to have an opportunity to fully delineate the nature of his mineral discovery. With the strict application of the marketability test to a location, the department precludes the ability of a claimant to develop a prospect that may only be marginally marketable into one that is highly marketable.

For court decisions that have considered the flexibility of the construction of the marketability rule see Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 303 U.S. 1025 (1969); Barton V Morton, 498 F. 2d 288 (9th Cir.1974) (after discovery of mineral deposit the claimant need only show a reasonable prospect that a

profitable mine will be developed); Multiple Use Inc. v. Morton, 353 F. Supp. 184 (D. Ariz. 1972), aff'd, 504 F.2d 448 (9th Cir. 1974) (it need not be proved that the claim can in fact be operated at a profit); Melluzzo v. Morton, 534 F. 2d 860 (9th Cir. 1976) (lack or insubstantiality of sales of material from claims in question if relevant to the question of marketability. It is not, however, conclusive proof of lack of value.)

IV. The Department Has Incorrectly Applied A "Too Much" or "Excess Reserves" Test

A valuable mineral deposit may not be declared invalid simply because a great quantity of mineral reserves cannot be marketed all at once. Baker v. United States, 613 F. 2d 224 (9th Cir. 1980), cert. denied, 449 U.S. 932 (1980). It is clear from the transcripts of the department hearings that the presence of

other valuable reserves of similar, but not identical, deposits was a conclusive factor in finding the Mendenhall claims invalid. It should be noted that the deposits in this case clearly could be marketed in the foreseeable future and that the opposition to the denial of ceriorari in Baker by Justice Blackmun with Justices Marshall and Powell is not at issue in this case.

SUMMARY OF ARGUMENT

The Department of the Interior has gone against the intent of Congress in administering the Surface Resources Act of 1955, 30 U.S.C. § 611. By applying the Act to valuable deposits of mineral, the Interior Department has created a miasma of irrelevant considerations regarding the validity of a mining claim--regulations applied without regard to the good faith of the claimant; without regard for present market for the mineral; without regard for the limits placed on the "marketability test" by the U. S. Supreme Court in Coleman and in Andrus v. Shell Oil.

CONCLUSION

The need for the U.S. Supreme Court to consider the issues in Mendenhall v. U.S. has attained to urgency. The court must affirm that (1) "common varieties," when claimant is, in good faith, developing a mineral deposit, are locatable under the mining laws and (2) the "marketability" test as used by Respondent is wholly outside the mining laws and unnecessary to their administration. The petition for writ of certiorari must be granted if law is to govern the public lands.

William S. Andrews

ENTRY OF APPEARANCE

and

CERTIFICATE OF SERVICE

I cerify that I am a member of the Supreme Court of the United States Bar; that I am appearing on behalf of Wayne Winters, editor-in-chief of the Western Prospector and Miner, in this matter and that forty (40) copies have been mailed to the Court and three (3) copies of the foregoing Amicus Curiae Brief have been served upon all appropriate parties by depositing the documents in a United States Post Office, first-class postage prepaid, this 11th day of January, 1985, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and

The Department of the Interior
Land and Natural Resources Division
Appellate Section
Attn: Wendy B. Jacobs, Attorney
18th and C. Streets, N.W.
Washington, D.C. 20240

William S. Andrews

William S. Andrews
Attorney for Amicus Curiae
1432 N. Seventh St.
Phoenix, Arizona 85006

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this 10th day of January, 1985, personally appeared before me, the undersigned officer, William S. Andrews, who acknowledged the above instrument.

Notary Public

My Commission Expires: